No. 10049

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership, CHARLES T. RUSSELL and INTERCONTINENT AIRCRAFT CORPORATION,

Appellees.

BRIEF FOR APPELLEES.

CHARLES PECKHAM,
710 Title Insurance Building, Los Angeles,
Attorney for Appellee Debtor.

ARTHUR H. DEIBERT,
1104 Pacific Mutual Building, Los Angeles,
Attorney for Charles T. Russell, individually.

O'MELVENY & MYERS,
GRAHAM L. STERLING, JR.,
900 Title Insurance Building, Los Angeles,
Attorneys for Intercontinent Aircraft Corporation.

Parker & Baird Company, Law Printers, Los Angeles

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Appellees.

BRIEF FOR APPELLEES.

Opinion Below.

The previous opinion in this case is the Memorandum of Conclusions of the District Court [R. 22-25], which is not reported.

Jurisdiction.

This appeal involves Federal Unemployment taxes for the year 1941 only and in the amount of $1,986.88. [R. 19-21.] The taxpayer filed in the District Court a petition dated April 3, 1941, asking that proceedings might be had in accordance with the provisions of Chapter XI

of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840. [R. 2-10.] The District Court granted this petition by order filed April 4, 1941. [R. 15.] On August 21, 1941, the United States filed an amended claim against the debtor in the District Court for certain taxes including the Federal Unemployment taxes involved herein. [R. 17-18.] The jurisdiction of the District Court to pass on such claim is found in Sections 2(a)(2) and 351 of the Bankruptcy Act of 1898 as amended by the Act of June 22, 1938. The decision of the District Court was filed November 3, 1941. [R. 29.] The notice of appeal was filed November 21, 1941 [R. 30], and the case comes to this Court pursuant to the provisions of Section 128(c) of Judicial Code and Section 24 of the Bankruptcy Act of 1898 as amended by the Act of June 22, 1938.

Question Presented.

The sole issue is whether the debtor is an "employer" within the definition of that term in Section 1607(a) of the Internal Revenue Code, the determination of such question being dependent upon whether the debtor employed eight or more persons on each of some twenty days during the taxable year 1941, each day being in a different calendar week. During 1941 the debtor employed eight or more persons from January 1 to May 16, inclusive, but employed none after the latter date.

Statutes and Regulations.

The pertinent portions of the statutes and regulations are set forth in the appendix, *infra*, pages 31 to 33.

Statement.

The facts are contained in a stipulation of facts. [R. 20-22.] The debtor is a co-partnership organized November 7, 1940. During the period from January 1, 1940 to May 16, 1941, inclusive, the debtor employed eight or more persons on each week-day with the exception of holidays and some Saturdays. The parties stipulated that debtor had no employees after May 16, 1941, when it ceased to do business. [R. 21-22.] It did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts. Its payroll from January 1 through May 16, 1941, amounted to $66,229.05 and it was stipulated that if any unemployment tax to the United States and to the State of California jointly was incurred by the debtor during said period, said tax was in the amount of $1,986.88. [R. 21.]

In April, 1941, the debtor petitioned for an arrangement under Chapter XI of the Bankruptcy Act, which petition was granted by order of the United States District Court dated April 4, 1941. [R. 13-15.] The United States filed a claim for unemployment taxes for the period January 1 to May 16, 1941 and the taxpayer opposed their payment on the ground that no taxes were owed. [R. 17-19.] After a hearing before the District Court, an order was entered holding that the debtor had not employed eight or more persons during twenty days of the year, each in a different calendar week; that under the provisions of Sections 1600 and 1607(a) of the Internal Revenue Code, the calendar year extending from January 1 to December 31, inclusive, constitutes the taxable year; that

under the aforesaid provisions of the Internal Revenue Code a week constitutes a period of seven days beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year only in the event that such day is one of the seven days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Code means twenty calendar weeks each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year; that since January 1, 1941, fell on a Wednesday and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than twenty weeks within the calendar year of 1941; that the debtor is not subject to the Federal Unemployment Tax Act, and that the claim of the Collector of Internal Revenue filed for unemployment taxes be denied. [R. 28-29.] From this decision the United States has appealed. [R. 30.]

Summary of Argument.

The debtor is not subject to the Federal Unemployment Tax Act for the reason that it did not employ eight or more persons on each of some twenty days during the year 1941, each day being in a different calendar week, inasmuch as the different calendar weeks specified in Section 1607(a) of the Internal Revenue Code mean full calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, which calendar weeks must be wholly within one and the same calendar year.

ARGUMENT.

The Debtor Did Not Employ Eight or More Persons on Each of Some Twenty Days During the Calendar Year 1941, in Different Calendar Weeks Wholly Within That Calendar Year, and Was Therefore Not an Employer Under the Act.

The sole question involved in this case is whether the debtor co-partnership is an "employer" within the definition of that term in Section 1607(a) of the Internal Revenue Code.

One of the facts stipulated by the parties is that eight or more persons were employed by the taxpayer during the period January 1 to May 16, 1941, inclusive, with the exception of holidays and some Saturdays. The debtor claims, and it has been upheld by the United States District Court, that during that period there were not twenty such days within the calendar year 1941, "each day being in a different calendar week." The Court below agreed that under the provisions of Section 1607(a) of the Internal Revenue Code a day may be counted as being one of the twenty days provided by that Section of the Code only in the event that such day is one of seven days of one and the same week falling *wholly* within one and the same calendar year, and that the twenty weeks so specified mean twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

It is at once apparent from a reading of Section 1600 of the Code and Section 403.205 of Treasury Regulations 107 that in providing for a Federal Unemployment Tax, Congress legislated with reference to *calendar* years as the

taxable period, specified as "each calendar year," and the tax is laid on the total wages paid by an employer in "each calendar year." We therefore come to a consideration of the question here involved with a clear admonition from Congress that it was dealing only with wages paid by an employer within a calendar year, and that the calendar year is the basis for all computations of both wages and time of employment in order to determine the liability of any employer for such tax.

It will be noted that under Section 403.205 of the Treasury Regulations 107, the Treasury stresses the fact that the twenty calendar days referred to in Section 1607(a) of the Code mean full calendar days as it refers to "the 24 hours of a calendar day." By the same token the law must have intended to deal with full calendar weeks and, the tax being on the basis of a calendar year, such full calendar weeks within each separate calendar year.

It should be observed that in Section 1600 of the Internal Revenue Code, *supra,* an employer, as defined in Section 1607(a) of the Code, is required to pay "for each *calendar* year" a tax "equal to three per centum of the total wages (as defined in Section 1607(b)) paid by him during the calendar year * * *".

It is obvious at the outset, therefore, that Congress, in enacting legislation imposing a Federal Unemployment Tax, selected the calendar year beginning January 1 and ending December 31 as the taxable year, and as the exclusive period of time during which the wages paid by an employer to an employee were to be so taxed, as well as the period for determining the question whether an employer "employed * * * in employment" 8 or more

persons on each of some 20 days, each day being in a different calendar week during the calendar year.

Therefore, the fixing of the calendar year by Congress as the taxable year, and as the period during which the tax of 3% is to be levied upon the total wages paid by an employer to his employees, would definitely seem to preclude the use of any number of days in either a preceding or succeeding calendar year for the purpose of determining either (1) the statutory period of 20 weeks within each calendar year, or (2) wages paid in the calendar year during which such tax liability, if any, is incurred.

It is, of course, well established that Federal taxation is on an annual basis, and that a taxable year is a calendar year unless otherwise specified. It is worthy of note, however, that in the legislation imposing an unemployment tax, the Congress, in Section 1600, *supra,* left no doubt on this point by specifically confining the application of the tax to "each calendar year" and at the rate of 3% of the total wages *"paid by him* (the employer) *during* the *calendar year."*

In order to ascertain the real intent of Congress in enacting legislation the best source of information is the legislative history of the particular enactment. The courts of this country, including the Supreme Court of the United States, where a doubt has arisen as to the legislative meaning, repeatedly have gone back to the reports of legislative and Congressional committees to determine if possible what the legislators really intended. An examination of such history of the Federal Unemployment Tax Act, with which we are here concerned, is particularly pertinent and enlightening.

This legislation was first considered by the Committee on Ways and Means of the House of Representatives under the title "The Social Security Bill," and on April 5, 1935, the Chairman of the Committee on Ways and Means submitted to the House of Representatives Report No. 615 on said Bill. In that Report, the Committee made the following significant statement:

> *"Definitions.*
>
> "Section 907: The definitions set up by this seciton are *very important* in connection with the *application* and *scope* of the entire title. They are as follows:
>
> "(a) Employer: The term 'Employer' includes only those persons who, in each of *at least 20 weeks in the year,* have a total number of 10 or more employees. This means that if on 1 day a week for 20 weeks (which need not be consecutive) there are 10 employees, the employer is covered. The employees (who need not necessarily be the same people) need not all be employed at the same moment; it is enough if during the day the total number is at least 10. The employees are not counted unless they are employed in 'employment' as defined in this section." (Italics supplied.)

The Senate Finance Committee in its Report No. 628, dated May 13, 1935, on the same Bill, made the following statement:

> *"Definitions.*
>
> "Section 907: The definitions set up by this section are *very important* in connection with the *application* and *scope* of the entire title. They are as follows:

"(a) Employer: The term 'employer' includes only those persons who, in each of *at least 13 weeks in the year,* have a total number of 4 or more employees. (In the House bill it was 20 weeks and 10 or more employees.) This means that if on 1 day a week for 13 weeks (which need not be consecutive) there are 4 employees, the employer is covered. The employees (who need not necessarily be the same people) need not all be employed at the same moment; it is enough if during the day the total number is at least 4. The employees are not counted unless they are employed in 'employment' as defined in this section." (Italics supplied.)

Section 907 of the original Social Security Bill eventually became Section 1607 of the Internal Revenue Code, as amended.

From the above quoted excerpts from House and Senate Committee reports it will be seen that the House originally defined an employer as a person who in each of *at least 20 weeks in the calendar year* has a total number of 10 or more employees, while the Senate provided that an employer was a person who in each of *at least 13 weeks in the calendar year* has a total of 4 or more employees. Clearly a week to be "in the year" must be in the calendar year.

Because of these and other differences in the respective bills which passed the House and the Senate, a conference of the House Ways and Means Committee and the Senate Finance Committee was arranged and on July 16, 1935, the Committee of Conference submitted a report, making cer-

tain recommendations to compose the differences in the bills passed by the respective Houses, and among their recommendations, which were adopted, appears the following:

> "Amendments nos. 90 and 91: The House bill provided that the term 'employment', as used in title IX, should not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was 10 or more. The Senate amendments reduce the number of days from 20 to 13, and the number of individuals from 10 to 4. The Senate recedes on amendment numbered 90, and the House recedes on amendment numbered 91 with an amendment fixing the number of individuals at eight."

It will be observed that amendment number 90 was a Senate amendment, reducing the number of days from 20 to 13 and the number of individuals from 10 to 4, and that the Senate receded completely on this amendment, the House receding on its amendment number 91 with an amendment which fixed the number of individuals at 8.

It is significant to note that the only change made by the Conference Committee was in the number of weeks, which was fixed at 20, and the number of individuals, which was fixed at 8, both purely mathematical changes, which left completely undisturbed the definitions set forth by the House and Senate Committees in their respective reports above quoted.

Obviously, a week to be "in the calendar year" must be *wholly* "in the calendar year."

In its brief the Government relies upon S. S. T. 414, 1941-1 Cum. Bull. 412, in which it is stated that the term "calendar week" in Section 1607(a) of the Code as amended means a period of 7 successive days beginning with Sunday and ending at the close of the following Saturday. The memorandum ruling in question then states the bare conclusion, without any reasoning whatever, that, "For the purpose of Section 1607(a) of the Code, as amended, a day during a taxable (calendar) year is in a separate 'calendar week' even if such calendar week does not fall wholly within the calendar year."

With the definition of the term "calendar week" in Section 1607(a) of the Internal Revenue Code, as amended—"a period of 7 successive days beginning with Sunday and ending with the close of the following Saturday"—we are in accord.

We do not agree, however, with the further statement in the ruling just quoted that, for the purpose of the said Section, a day during a taxable (calendar) year is in a separate "calendar week" even if such calendar week does not fall wholly within the calendar year. Such a ruling, we are convinced, does violence to the intent of Congress as plainly manifested in the Committee reports, and to the language of the pertinent provisions of Sections 1600 and 1607(a) of the Code, as amended, *supra*.

In a chapter on "Time" in 62 C. J. 960, appear the following:

> "Sec. 2.—Definitions. The nature of time is such that it is capable of division, and of the divisions which have been made, the Courts will take judicial notice."

"SEC. 9.—CALENDAR YEAR. Ordinarily and in common acceptance 365 days save leap year; from January 1 to December 31, inclusive. * * *."

The Supreme Court of the United States, in an early decision, *Ronkendorff v. Taylor,* 4 Pet. 361, held that the week commences immediately after 12 o'clock on the night between Saturday and Sunday, and ends at 12 o'clock, 7 days of 24 hours each, thereafter. There was thus established the highest judicial determination of a calendar week.

Even though the ruling, S. S. T. 414, *supra,* is correct in its definition of the term "calendar week," it by no means follows that it is likewise correct in its assertion that for the purpose of Section 1607(a) of the Code, a day during a taxable (calendar) year is in a separate "calendar week" even if such calendar week does not fall wholly within a calendar year. Such definition utterly ignores the exclusiveness of the language in Section 1607(a) "during the taxable year," and in the quoted Committee reports "20 weeks [or 13 weeks] *in the year.*" This Court, of course, is not called upon to follow such ruling, which is merely a definition promulgated by one of the divisions of the Bureau of Internal Revenue. On page IV of the Internal Revenue Bulletin No. 17, dated April 28, 1941, in which the ruling S. S. T. 414 appears, the meaning of the abbreviation "S. S. T." is stated as follows: "Taxes on employment by others than carriers."

On the same page, the abbreviation "G. C. M." is explained as "General Counsel's, Assistant General Counsel's, or Chief Counsel's Memorandum."

Memoranda bearing the symbol "G. C. M." are published in the Internal Revenue Bulletin as are other rulings

of the Bureau, such as the S. S. T. above referred to, but neither has the force or effect of a Treasury Decision, which is abbreviated as "T. D." A "T. D." is approved and signed by both the Commissioner of Internal Revenue and the Secretary of the Treasury, but minor rulings such as an S. S. T. or a G. C. M., are not. The Courts have ascribed to Treasury Decisions ("T. D's.") the force and effect of law only when they are of long standing as official interpretations by the Treasury Department of the Revenue laws, and have been left unchanged and unaffected by the passage of subsequent Revenue Acts. Consequently, rulings such as an S. S. T. or a G. C. M. do not have the force and effect of law, and in addition thereto S. S. T. 414 was promulgated only on April 28, 1941.

In this connection, it is to be noted that in *W. S. Van Dyke v. Commissioner of Internal Revenue,* 120 F. (2d) 945, this Court, on June 16, 1941, held that the Commissioner was not bound by three General Counsels' Memoranda therein cited, and that the fact the taxpayer relied upon erroneous advice contained in those Memoranda was immaterial, saying:

> "It is immaterial, if true, that petitioner relied on the erroneous advice contained in G. C. M. 9938, 9953 and 14198. These memoranda were not, as petitioner supposes, rules or regulations having the force of statutes. They were merely communications from counsel to the Commissioner. The advice they contained was for the Commissioner's, not petitioner's, guidance. If petitioner relied on it, he did so at his peril."

It may be observed that the General Counsel's Memoranda therein referred to were rulings published by the

Bureau of Internal Revenue, just as S. S. T. 414 was published, and that the medium of publication, the Internal Revenue Bulletin, is not merely for the information of the employees of the Bureau of Internal Revenue, but for the tax-paying public and tax practitioners as well, among whom it has a wide circulation.

Attention is further invited to the fact that in the reports of both the House Committee on Ways and Means and the Senate Finance Committee it was stated that the 20 weeks provided for in the law "need not be consecutive." As has been shown above, a calendar week consists of 7 full days, beginning on Sunday morning and ending the following Saturday night, and, in using the term "calendar weeks", Congress must have had in mind full calendar weeks falling wholly within the calendar year, and not partial calendar weeks. Otherwise it would have been impossible to define a measure of time as a "calendar week" in providing that the 20 weeks need not be consecutive. In view of the fact that Congress made no provision for a partial calendar week, we believe it necessarily follows that a calendar week "in the year" means a full and complete calendar week of 7 successive days beginning Sunday and ending the following Saturday, wholly within each separate calendar year.

The fixing of 20 calendar weeks and 8 or more employees by Congress as criteria for the purpose of determining who is an employer within the meaning of the Federal Unemployment Tax Act, was, of course, purely arbitrary. Congress could have fixed either a greater or lesser number of weeks or employees, as such determination is properly within its province. Therefore, if a person has in his employ 8 or more individuals on one day of

each of 19 full calendar weeks in the year, he does not fall within the definition of an employer and is not subject to the Unemployment Tax. Employment in each of 20 calendar weeks in the year is mandatory.

January 1, 1941, which was a holiday and on which day the debtor did not have 8 or more employees engaged in work, fell on Wednesday. Even including that day, however, from January 1 to May 16, 1941, inclusive, the latter being the last day on which the debtor had any employees (and then went out of business) there were only 18 full calendar weeks of 7 successive days each, as the first four days of January did not constitute a calendar week, nor did the 6 day period from Sunday, May 11, to Friday, May 16, the last day on which the debtor had any employees.

On page 8 of the Government's brief it is stated that,

> "* * * in the period following midnight, Saturday, May 10, 1941, there was at least one such day not within any of those 18 weeks [referring to 18 full calendar weeks during the period January 1 to May 16, 1941] and the taxpayer apparently does not object to counting that day. * * *"

This statement is obviously incorrect inasmuch as in its brief in the District Court the debtor pointed out, as stated in the preceding paragraph, that "* * * from January 1 to May 16, 1941, inclusive, * * * there were only 18 full calendar weeks of 7 successive days each, as the first 4 days of January did not constitute a calendar week, nor did the 6-day period from Sunday, May 11, to Friday, May 16, the last day on which the debtor had any employees." Consequently the debtor did

specifically object to counting a day during the 6-day period ending May 16, 1941.

The Government also relies upon the opinion of the District Court of Massachusetts in *Garage Service Corp. v. Hassett,* decided January 12, 1942, not officially reported, but found in paragraph 8974 in C. C. H. Unemployment Insurance Service. In that opinion the Court disagreed with the plaintiff's contention that the calendar week from which a day is taken must fall within the taxable year, saying,

> "* * * Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. * * *"

If that Court is correct in the statement just quoted there is not only a departure from the basic scheme of Federal taxation on an annual basis which is now so firmly established as to require no citations of authority, but it is also a denial of the specific intent of Congress with reference to the Federal Unemployment Tax Act as shown by the references in that Act to wages paid within the calendar year and to the calendar year in the computation of time, and as so plainly expressed in the House and Senate Committee reports, *supra.* Bearing in mind, therefore, the fact which we do not believe can be successfully controverted, that the plan of the Federal Unemployment Tax Act is based entirely upon the calendar year, the error into which we believe the Massachusetts Court fell in the *Garage Service Corporation* case is apparent and can be demonstrated by visualizing the situation which would result from the application of the Court's theory.

For example, in 1940, December 29, 30 and 31 fell respectively on Sunday, Monday and Tuesday, while in 1941, January 1, 2, 3 and 4 fell respectively on Wednesday, Thursday, Friday and Saturday. Consequently there were two normal working days in 1940 and three in 1941 during the 7 day period from Sunday, December 29, 1940, to Saturday, January 4, 1941. Under the theory of the Massachusetts Court, therefore, it would be possible to count one day, either December 30 or 31 in 1940 for the purpose of determining the statutory 20 week period within the calendar year 1940, and at the same time count either January 2, 3 or 4, 1941, for the purpose of determining the 20-week period within the year 1941, thereby using the *same* calendar week of December 29, 1940 to January 4, 1941, *twice,* once in 1940 and again in 1941, for the purpose of determining the taxability of an employer, when such computation is plainly and specifically prohibited by Section 1607(a) itself, which requires that in computing "each of some 20 days during the taxable year" each day must be "in a *different* calendar week." Obviously the same calendar week cannot be used in each of two calendar years for the purpose of finding 20 days in each calendar year in *different* weeks.

The rule for which the Government contends would, by using partial weeks at the beginning and end of each year, result in their being 54 weeks in each year instead of the usual 52; a somewhat startling phenomenon.

In answer to the further contention of the Government on page 9 of its brief, it should be said that appellees have not attacked the *method* of classification in Section 1607(a) of the Code, but are merely attempting to demonstrate that appellant has given a wholly erroneous interpretation

to the language of that section, an interpretation directly contrary to that expressed in precise terms in the reports of the House Ways and Means Committee and the Senate Finance Committee, *supra,* when they said, respectively:

> "(a) Employer: The term 'Employer' includes only those persons who, in each of at least 20 weeks *in the year* * * *." and
>
> "(a) Employer: The term 'Employer' includes only those persons who, in each of at least 13 weeks *in the year* * * *."

As previously stated, the number of weeks was finally fixed at 20 by agreement between the two Houses of Congress.

It would seem that the terms "calendar week" and "in the year" are so plain and explicit in their meaning that they should not be misunderstood or misinterpreted. In that connection the rule of *United States v. Merriam,* 263 U. S. 179, 68 L. ed. 240, is pertinent:

> "* * * in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyand the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. * * *"

In dealing with the question whether a citizen of the United States was "a *bona fide* non-resident of the United States for more than 6 months during the taxable year"

within the meaning of Section 116(a) of the Revenue Act of 1936, which provides in part as follows:

> "Sec. 116. EXCLUSIONS FROM GROSS INCOME. In addition to the items specified in Section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> "(a) Earned Income From Sources Without United States—In the case of an individual citizen of the United States, a *bona fide* nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection."

the Bureau of Internal Revenue has laid down, through G. C. M. 22,065, Cum. Bull. 1940-1, page 100, the opposite of the rule for which it is contending in this case. There, the taxpayer was endeavoring to establish that he was a *bona fide* non-resident of the United States for more than 6 months because of four absences from the United States consisting of two trips to Europe and two trips to Canada. In computing the time from which he was absent from the United States, taxpayer added the hours and minutes of the time so absent and the aggregate time so computed exceeded 6 months by 22 hours and 30 minutes. After announcing that the specific inquiry presented in that case related to the proper basis upon which the 6-month statutory period should be computed, the rul-

ing held that one of the periods of absence, that from October 16 to November 8, "is a fractional part of a calendar month and is not, therefore, to be recognized in computation." Exemption from taxation was therefore denied.

Clearly, the appellant cannot consistently maintain its position in each of two diametrically opposite conclusions.

In one of the cases cited in its brief by the Government, *Carmichael v. Southern Coal Co.,* 301 U. S. 495, the Supreme Court of the United States had before it for decision the question whether the Unemployment Compensation Act of Alabama (one of the group of laws enacted by a number of the states following the lead and the pattern of the Federal Social Security Act which levied a Federal unemployment tax) was constitutional.

In holding the Alabama law valid the Court, speaking through Mr. Justice Stone, pointed out that the said Act

> "* * * sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the Act. These employers include all who employ eight or more persons for twenty or more weeks *in the year,* Sec. 2(f), except those engaged in certain specified employments.
>
> * * * * * * * *
>
> "(a) Exclusion of Employers of Less than Eight. Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see Booth v. Indiana, 237 U. S. 391, 397, 59 L. ed. 1011, 1017, 35 S. Ct. 617. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between

> those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not." (Italics supplied.)

The Court thus lent special emphasis to the fact that the number of employees, the number of days, and the number of weeks specified in such legislation are entirely arbitrary, but by the same token the lines of demarcation so laid down must be strictly observed, no less by the Government than by taxpayers.

The foregoing quotation appears to be a complete answer to the charge of unfair discrimination in the example cited by the Government in the first complete paragraph on page 9 of its brief. Continuing its discussion of the exemption of particular classes of employers, the Court made the following significant pronouncement:

> "Similarly, the legislature is free to aid a depressed industry such as shipping. The exemption of business operating for *less than twenty weeks in the year* may rest upon similar reasons, or upon the desire to encourage seasonal or unstable industries." (Italics supplied.)

The foregoing quotation would seem to be an explicit approval of our contention that the tax in question is levied only upon those employers who, having eight or more

employees, operate for *at least* twenty calendar weeks *in the year*. The context of the quotation clearly shows that the Court must have had in mind twenty full calendar weeks *"in the year."*

Because the California Unemployment Insurance Act is, for the purpose of determining the question at issue in the case at bar, essentially similar to the Federal Unemployment Tax Act, and also because the State of California would be entitled to the major portion of the taxes sought to be collected herein, we believe it will be helpful to quote a portion of the California Act and to cite several rulings thereunder.

Section 9 of the California Act, Chapter 352, Laws of 1935, as amended, provides in part as follows:

> "Sec. 9. Employer means:
>
> "(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, *in each of twenty different weeks,* whether or not such weeks are or were consecutive, *has within the current calendar year* or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day;" (Italics supplied.)

Sections 37 and 38 of the California Act relate to contributions and, so far as pertinent, provide as follows:

"Sec. 37(a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer *for each calendar year* in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1937 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) become payable on a basis of 'wages paid' rather than 'wages payable', then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ." (Italics supplied.)

"Sec. 38. Every such employer shall pay into the employment fund contributions equal to the following amounts:

* * * * * * * * *

"(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for employment subject to this act."

In the Rules adopted by the State of California for the administration of the State Unemployment Insurance Act,

C. C. H. Unemployment Insurance Service, pp. 8301, *et seq.*, the following definition of "week" is included:

> "Rule 12.1. Term 'Week' Defined.—The term 'week', unless the wording clearly otherwise requires, whenever used in the Act, Rules and Regulation, forms, procedures and instructions thereon and all other official pronouncements of the Department of Employment, shall mean the period of seven consecutive days commencing Sunday and ending Saturday.
>
> "This revised rule shall become effective September 29, 1940, provided that an employing unit shall not become an employer subject to the Act solely by reason of its employment of four or more individuals upon said effective date if such employing unit has not, prior to said effective date, employed four or more persons in each of more than nineteen 'weeks'. (Adopted November 19, 1937, effective January 1, 1938; revised December 2, 1939, effective December 28, 1939; revised October 18, 1940, effective September 29, 1940.)"

The following are excerpts from Codified Interpretative Opinions under the California Act:

> Opinion No. 2009-02, March 10, 1941.
>
> "Section 9(a) of the Act as amended effective August 27, 1939, provides in part that a subject employer (prior to January 1, 1938) was 'any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals * * *.' Since the 'M' Company had the requisite employment experience; i. e., eight or more individuals in employment on

some portion of a day *in each of twenty different weeks during the preceding calendar year* (1936) it fell squarely within the provisions of amended Section 9(a) and therefore became subject to the Act on the effective date of the section; i. e., August 27, 1937." (Italics supplied.)

Opinion No. 5011-01, February 7, 1941.

"*Since the calendar year is the unit or period for the determining of contribution liability,* only the net wages for the year are properly taxable as provided by Section 11(b) and Rule 11.6. To arrive at a net wage for the year all business expenses properly deductible which are incurred during the calendar year may be deducted from the earnings for the entire year. Thus, where business expenses exceed earnings in one calendar quarter these expenses may be carried into a subsequent calendar quarter and deducted from the earnings during that quarter. This procedure may be followed until the expenses are exhausted or *until the final quarter of the year has been reached,* whichever occurs first. The $50.00 excess in expenses incurred by 'S' during the first quarter of the year may be deducted from the $100.00 in net earnings realized in the second quarter, and the reports filed by 'M' Company will show only $50.00 net earnings for the second quarter.

"Where the final quarter of the calendar year shows an excess of expenses over earnings, *this excess may not be carried into the next calendar year.* However, if net wages have been reported for prior calendar quarters in the same calendar year, an adjustment may be made and a credit granted the employer for an overpayment. In making this adjustment, the expenses should be prorated among the various quarters in which net earnings have been reported." (Italics supplied.)

These rulings under the California Act, particularly Opinion No. 5011-01, indicate clearly that the State of California has made the calendar year the exclusive unit or period of time for determining the liability of an employer under the State Unemployment Insurance Act, and we think it clear that the same standard of measurement is applicable in the administration of the Federal Unemployment Tax Act. It is believed that under the law and rulings above quoted the debtor is exempt from tax under the California Unemployment Insurance Act.

Summary.

In determining whether the debtor had in its employ 8 or more employees during 20 calendar weeks in the calendar (taxable) year of 1941, prior to its going out of business at the close of business May 16, 1941, we believe the following resumé may be helpful:

(1) Section 1600 of the Internal Revenue Code, as amended, requires every employer, as defined in Section 1607(a), to pay for the calendar year 1939, and "for each calendar year thereafter" an excise tax, with respect to having individuals in his employ, equal to 3% of the total wages *"paid by him during the calendar year"* with respect to employment after December 13, 1938. This language not only makes the taxable year co-existent with the calendar year, but limits the 3% tax on wages to the wages paid by an employer *"during the calendar year"*. This definitely negatives the Government's assertion that for the purpose of levying and collecting such

tax the Commissioner is permitted to go back to a preceding calendar (taxable) year and add to a partial calendar week at the beginning of a year several days in the preceding calendar year in order to make up a full calendar week. To be specific, wages paid in 1940 are not taxable under Section 1600 of the Code in 1941 but only in 1940, and that section places the Unemployment Insurance Tax exclusively on a calendar year basis for all purposes.

(2) Both the House Ways and Means Committee and the Senate Finance Committee stressed the fact that the definitions set up by Section 907 of the original Social Security Act, which later became Section 1607(a) of the Internal Revenue Code, *"are very important* in connection with the *application* and *scope* of the *entire title"*. (Italics supplied.)

The said reports both then proceeded to define the term "employer" as only those persons who, on one day in each of *at least 20 weeks in the year* have a total of 8 or more employees.

This language is highly significant in its use of the terms "at least" and "20 weeks in the year". Its obvious meaning must be that a person who employs others is not an employer within the meaning of the Section if his employment of such others (8 or more) falls short of 20 complete calendar weeks, and further that such 20 complete weeks must be *"in* the year", meaning the calendar year which is set up as the measure of time in Section 1600 of the Code. Certainly there would be

no fixed or definite measure of a calendar week if Congress had had less than a complete calendar week in mind, particularly in view of the fact that the 20 calendar weeks were not required to be consecutive. Accordingly, nothing less than a full calendar week of 7 successive days beginning on Sunday and ending the following Saturday would be a correct yardstick by which to measure non-consecutive calendar weeks, and we contend the references to "at least 20 weeks *in the year*" definitely confine such 20 weeks within each separate calendar year.

(3) To permit partial calendar weeks at the beginning or end of a calendar year to be counted as statutory calendar weeks would allow the same calendar week to be used twice, once in each of two successive years, and would nullify the specific requirement that each of the 20 days shall be "in a different calendar week". (Section 1607(a) of the Code.)

(4) The Supreme Court of the United States, in *Carmichael v. Southern Coal Co., supra,* interpreting a State law based upon the Federal Unemployment Tax Act, refers to 20 weeks "in the year".

For the foregoing reasons, we contend that the debtor in this case did not employ 8 or more persons on at least one day in each of 20 calendar weeks in the year 1941, within the correct interpretation of the language used by Congress in the pertinent sections of the Internal Revenue Code, and that the debtor is therefore not subject to the Federal Unemployment Tax Act.

Conclusion.

The decision of the Federal District Court in this case is correct and should be affirmed.

Respectfully submitted,

CHARLES PECKHAM,
Attorney for Appellee Debtor.

ARTHUR H. DEIBERT,
Attorney for Charles T. Russell, individually.

O'MELVENY & MYERS,
GRAHAM L. STERLING, JR.,
Attorneys for Intercontinent Aircraft Corporation.

APPENDIX.

Statutes and Regulations.

Internal Revenue Code.

"Sec. 1600. Rate of Tax.

Every employer (as defined in section 1607(a)) shall pay for the *calendar* year 1939 and for each *calendar* year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the *total wages* (as defined in section 1607(b)) *paid by him during the calendar* year with respect to employment (as defined in section 1607(c)) after December 31, 1938." (Italics supplied.)

"Sec. 1601. Credits Against Tax.

(a) Contribution to State Unemployment Funds.—

"(1) The taxpayer may, to the extent provided in this subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

"(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

"(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 1604 to file a return for such year; except that credit shall be permitted for contributions paid after such

last day but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day. The preceding provisions of this subdivision shall not apply to the credit against the tax of a taxpayer for any taxable year if such taxpayer's assets, at any time during the period from such last day for filing a return for such year to June 30 next following such last day, both dates inclusive, are in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

* * *

"(c) Limit on Total Credits.—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable."

"SEC. 1607. DEFINITIONS.

"When used in this subchapter—

"(a) Employer.—The term ('employer') does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more."

REGULATIONS.

So far as pertinent, Treasury Regulations 107, Section 403.205, provide as follows:

"Reg. 107, Sec. 403.205. Who are employers.—Every person who employs eight or more employees in employment within the meaning of section 1607(c) and (d) of the Act on a total of 20 or more calendar days *during a calendar year,* each such day being in a *different calendar week,* is with respect to such year an employer subject to the tax.

"The several weeks in each of which occurs a day on which eight or more employees are employed *need not be consecutive weeks.* It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the eight or more employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is eight or more." (Italics supplied.)